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Supreme Court, U.S.
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No. 98-222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

MICHAEL EMERSON CORRELL,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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10 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Michael Correll's three first-degree murder convictions and two death sentences were affirmed by the Arizona Supreme Court. In his state post-conviction relief petition, Correll alleged that his attorney at sentencing was constitutionally deficient for not presenting additional mitigating evidence. Correll failed to allege any additional evidence not presented at the time of sentencing, and his post-conviction relief attorney conceded that he could not prove prejudice under *Strickland v. Washington*. Based on the record before him, the state trial judge denied the petition as failing to state a colorable claim.

Correll filed a petition for writ of habeas corpus raising, inter alia, a claim of ineffective assistance of counsel at sentencing. Correll moved to supplement his petition to include affidavits and other evidence never alleged or presented to the state courts in support of his ineffectiveness claim. The district court concluded that this new evidence could not be considered based on this Court's holding in *Keeney v. Tamayo-Reyes*, and denied Correll's request for an evidentiary hearing. The Ninth Circuit reversed, finding that there was no "evidence exhaustion" requirement under *Keeney* and that Correll was entitled to an evidentiary hearing on his claim. The court also found that the state court's failure to hold an evidentiary hearing would constitute cause for Correll's procedural default if one existed. These holdings are inconsistent with the opinions of other circuit courts and raise the following questions:

1. May a state inmate receive a federal evidentiary hearing on a claim of ineffective assistance of counsel and present evidence never alleged as the basis for the claim in state court?

2. Is the state court's determination that there is no colorable claim of prejudice "cause" for the failure to develop the evidence in state court?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REASON WHY THE WRIT SHOULD ISSUE 1

AFTER THE DRAFTING AND FILING OF THE PETITION FOR CERTIORARI, THE NINTH CIRCUIT SPECIFICALLY RECOGNIZED THAT THE VARIOUS CIRCUIT COURTS OF APPEAL HAVE A DIVERGENCE OF OPINION CONCERNING THE CORRECT INTERPRETATION OF *KEENEY v. TAMAYO-REYES*. 1

THE ISSUE BEFORE THE NINTH CIRCUIT COURT WAS WHETHER THE DISTRICT COURT ERRED BY REFUSING TO EXPAND THE HABEAS RECORD BY HOLDING AN EVIDENTIARY HEARING WHEREIN CORRELL COULD PRESENT HIS NEW EVIDENCE. IN RULING ON THAT ISSUE, THE NINTH CIRCUIT HELD THAT A COLORABLE CLAIM WAS PRESENTED TO THE STATE COURT, AND THEREFORE THE NEW EVIDENCE—NEVER OFFERED IN STATE COURT—COULD BE CONSIDERED. THIS HOLDING IS PROPERLY CHALLENGED IN THIS COURT. 3

CORRELL'S ATTEMPT TO JUSTIFY THE NINTH CIRCUIT'S OPINION ON THE BASIS THAT *TAMAYO-REYES* HAD A STATE-COURT EVIDENTIARY HEARING, AND HE DID NOT, IS WITHOUT MERIT AS RECOGNIZED BY THE NINTH CIRCUIT IN THIS CASE. 5

CONCLUSION 6

TABLE OF AUTHORITIES

CASES — PAGE

Chacon v. Wood,
36 F.3d 1459 (9th Cir. 1994) 1
Clemmons v. Delo,
124 F.3d 944 (8th Cir. 1997) 1, 2
Jones v. Vacco,
126 F.3d 408 (2d Cir. 1997) 3
Keeney v. Tamayo-Reyes,
112 S. Ct. 1715 (1992) 1, 2, 5
Mathis v. Zant,
975 F.2d 1493 (11th Cir. 1992) 1, 5
Mitchell v. Rees,
114 F.3d 571 (6th Cir. 1997) 1
Pagan v. Keane,
984 F.2d 61 (2d Cir. 1993) 1, 2
Seidel v. Merkle,
146 F.3d 750 (9th Cir. 1998) 1, 2

STATUTES

28 U.S.C. § 2254(d)(3) 2

REASON WHY THE WRIT SHOULD ISSUE

AFTER THE DRAFTING AND FILING OF THE PETITION FOR CERTIORARI, THE NINTH CIRCUIT SPECIFICALLY RECOGNIZED THAT THE VARIOUS CIRCUIT COURTS OF APPEAL HAVE A DIVERGENCE OF OPINION CONCERNING THE CORRECT INTERPRETATION OF *KEENEY v. TAMAYO-REYES*.

Before addressing the arguments submitted by Correll, it must be noted that after the drafting of the State's Certiorari Petition, the Ninth Circuit recognized that there is a conflict among the circuit courts regarding the interpretation and application of *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992). *See Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998). In the instant case, the Ninth Circuit found that there was no "evidence exhaustion" requirement and attempted to distinguish those cases from other circuits. (Appendix to Petition for Certiorari at 1992 n.3.) However, in *Seidel*, the Ninth Circuit retreated from the position that these cases can be distinguished and found that *Tamayo-Reyes* did not affect "the district court's broad authority to consider **any evidence** relevant to a federal habeas petitioner's claim." 146 F. 3d at 754 (emphasis added). As authority for this interpretation of *Tamayo-Reyes*, the Court cited to Justice O'Connor's dissent in *Tamayo-Reyes* and their own opinion in *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994). *Id.* The Ninth Circuit specifically recognized that their opinion was inconsistent with decisions from the Eleventh and Sixth Circuits. *Id.* (*See Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997), and *Mathis v. Zant*, 975 F.2d 1493 (11th Cir. 1992)). The court claimed that their opinion was consistent with cases from the Second and Eighth Circuits. *Id.* (*See Pagan v. Keane*, 984 F.2d 61, 63–65 (2d Cir. 1993), and *Clemmons v. Delo*, 124 F.3d 944, 951–52 (8th Cir. 1997)). Petitioners maintain that Ninth Circuit is wrong in concluding that these opinions from the other circuits support their conclusion that there is no evidence exhaustion.

In *Clemmons v. Delo*, the Eighth Circuit was faced with a situation where a material witness was not disclosed by the state—creating a *Brady* claim. In state court, the inmate had submitted a memorandum concerning what the witness would have said had he been called at trial; the witness did not testify at the state post-conviction relief proceeding. In federal court, the witness did testify before the district court. On appeal, the state maintained that the failure to call the witness at the state post-conviction proceeding was

a procedural default. The Eighth Circuit disagreed. The Eighth Circuit reaffirmed, however, its position that the states must be presented with critical facts if a prisoner is to avoid a procedural default. The Eighth Circuit's analysis of what a petitioner must do to exhaust his claim is consistent with the State's position in this case, and the district court's analysis below.

> In *Bolder*, petitioner argued in his state postconviction proceeding that his trial counsel was ineffective for failing "to interview or call character witnesses and inmate witnesses" for use as mitigation evidence in petitioner's capital sentencing proceeding. . . . This Court held that this claim was procedurally barred, not because of his failure actually to call the mitigation witnesses at his 27.26 proceeding, but because petitioner completely "failed to allege what mitigating evidence would have been discovered had [his lawyer at trial] conducted a reasonable investigation into his background." . . . The problem was not just that Bolder had failed to call the witnesses; he also neglected to allege what they would have said and thus failed to provide the 29.15 court with the particulars of his ineffective assistance of counsel claim. In contrast, Clemmons introduced Clark's statement, which, as we have already said, is admissible in 29.15 proceedings to show what Clark's testimony would have been at trial. Missouri law did not obligate Clemmons to do any more than he did to provide the 29.15 court with the factual basis for his claim. Clemmons was, therefore, not barred from presenting the substance of Clark's testimony to the District Court.

Clemmons v. Delo, 124 F.3d at 949 (citations omitted). The court emphasized again later in their opinion that a state petitioner was required to exhaust the factual basis of the claim. 124 F.3d at 951 n.5. Contrary to the Ninth Circuit opinion, *Clemmons* does not support the theory that once a claim is raised in state court, federal courts have the discretion to consider "any" evidence that would relate to his federal claim. *Seidel v. Merkle*, 146 F.3d at 754.

In *Pagan v. Keane*, the Second Circuit held that after *Tamayo-Reyes*, district courts continued to have the inherit authority to hold evidentiary hearings when "the material facts were not adequately developed at the State court hearing." 984 F.2d at 63 (citing 28 U.S.C. § 2254(d)(3)). *Pagan* does not discuss, however, whether the disputed evidence was presented in state

court. After *Pagan*, the Second Circuit was faced with a challenge concerning the failure to present material facts to the state court. In *Jones v. Vacco*, 126 F.3d 408, 413 (2d Cir. 1997), the Court recognized that to exhaust a claim, both the facts and law must be presented to the state court:

> The exhaustion doctrine is satisfied if the claim has been "fairly presented" to the state courts. *See Dorsey*, 112 F.3d at 52 (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971)). A claim has been "fairly presented" if the state courts are apprised of "both the factual and the legal premises of the claim [the petitioner] asserts in federal court."... The state courts will not have a fair opportunity to review the claim if material factual allegations have been omitted.

Id. Again, the Second Circuit's opinions would not support the Ninth Circuit's conclusion that the district court's discretion would allow the presentation of any evidence regardless whether such evidence was presented in state court. The Ninth Circuit's ruling in this case is not supported by any compelling authority. Moreover, to the extent the Eighth and Second Circuit Court opinions discussed above are deemed to be consistent with the Ninth Circuit's ruling, this Court should grant the petition to rectify the supposed inter-Circuit conflict and clarify the exhaustion requirement.

THE ISSUE BEFORE THE NINTH CIRCUIT COURT WAS WHETHER THE DISTRICT COURT ERRED BY REFUSING TO EXPAND THE HABEAS RECORD BY HOLDING AN EVIDENTIARY HEARING WHEREIN CORRELL COULD PRESENT HIS NEW EVIDENCE. IN RULING ON THAT ISSUE, THE NINTH CIRCUIT HELD THAT A COLORABLE CLAIM WAS PRESENTED TO THE STATE COURT, AND THEREFORE THE NEW EVIDENCE—NEVER OFFERED IN STATE COURT—COULD BE CONSIDERED. THIS HOLDING IS PROPERLY CHALLENGED IN THIS COURT.

Correll claims that the State mischaracterizes the facts and that his "new evidence" did not play a role in the Ninth Circuit's determination in finding a colorable claim. Correll's assertion is confusing at best, and is merely an attempt to obfuscate the issue. The issue before the Ninth Circuit was whether the district court erred by refusing to expand the habeas record and hold an evidentiary hearing wherein Correll could present his new evidence.

In ruling on that issue, the Ninth Circuit held that Correll had presented a colorable claim to the state court, and therefore the new evidence could be considered at the hearing. In its petition, the State meticulously outlined what was presented to the state court. (Petition at 3–5.) In discussing the applicable law to the facts of the case, the State stated:

> The state courts should have the opportunity to rule on the merits of a claim with both the material facts and legal theories presented to them. In this case, Correll's own attorney conceded that he could not show prejudice based on the status of the record before the state court. It was only after Correll filed his federal petition that he offered the affidavits of the two psychiatric doctors that could possibly constitute a colorable showing of prejudice under *Strickland*. The district court clearly did not abuse its discretion by refusing to allow Correll to circumvent the exhaustion requirement by presenting this new evidence.

(Petition at 12.) In a footnote, the State quoted the portion of the Ninth Circuit's analysis of what the court determined was a colorable claim. (Petition at 12 n.3.) The State never intimated, in any manner, that the "new evidence" played a part in the Ninth Circuit's analysis of whether there was a colorable claim in state court. Given the fact that Correll's attorney conceded in state court that there was no colorable claim based on the status of the state court record, the State took issue with the Ninth Circuit's analysis on that point but nonetheless asserted that the new evidence offered in federal court could not be considered.

Correll does not dispute several very important points in the analysis of this issue. First, that his attorney in state court conceded there was insufficient evidence of prejudice under *Strickland* prior to the state court dismissing the state post-conviction relief petition. (Petition at J–2.) Second, that the California Department of Corrections' mental health examination report, relied on by the Ninth Circuit for its colorable claim analysis, was submitted to the state trial court after he had dismissed the petition. (Petition at K–1.) Finally, after the district court refused to expand the record, Correll attempted to exhaust his new evidence in state court, but procedurally defaulted by not filing the claim within 30 days of the filing of his notice to seek additional post-conviction relief.

After Correll's state-court concession that he could not show prejudice, a fact binding on Correll in these proceedings, the state trial court did not err under state law by dismissing the petition without conducting an evidentiary hearing. Correll's tardy submission of the California report is a procedural default precluding the federal courts from considering it. Finally, Correll's failure to timely file his successive state court petition is likewise a default prohibiting consideration of the new evidence that he now desires to present. The Ninth Circuit's analysis is not only inconsistent with the holding in *Tamayo-Reyes* and the other circuits' interpretation of that case, but it fails to recognize the multiple defaults Correll committed preventing the state court from entertaining the factual basis of the claim.

CORRELL'S ATTEMPT TO JUSTIFY THE NINTH CIRCUIT'S OPINION ON THE BASIS THAT *TAMAYO-REYES* HAD A STATE-COURT EVIDENTIARY HEARING, AND HE DID NOT, IS WITHOUT MERIT AS RECOGNIZED BY THE NINTH CIRCUIT IN THIS CASE.

Correll attempts to reconcile the cases finding a default when the prisoner fails to present material facts to the state courts by claiming that in those cases the states granted an evidentiary hearing, and in this case Arizona did not. However, when faced with this argument below, even the Ninth Circuit rejected this distinction.

> Correll argues that the cause and prejudice requirement does not apply because the *Tamayo-Reyes* rule is restricted to cases in which petitioners received a state-court hearing. Contrary to Correll's argument, *Tamayo-Reyes* endorses no such general limitation, although there are exceptions, as we found in *Chacon v. Wood*, 36 F.3d 1459, 1465-66 (9th Cir.1994).

(Appendix to Petition at 1987.) No other circuit has drawn this distinction, and Correll admits that other circuits have applied *Tamayo-Reyes*'s procedural bar even when there was no state-court evidentiary hearing. *See, e.g., Mathis v. Wright*, 975 F.2d 1493, 1497 (11th Cir. 1992). The only basis offered by Correll to support the Ninth Circuit's holding has no support from any other circuit and has been rejected by the Ninth Circuit in Correll's own case. This Court should likewise reject the contention and accept the petition.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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